Capital City Property Sdn Bhd v Achwell Property Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-724–06 OF 2022
ONG CHEE KWAN J
3 JANUARY 2023

Civil Procedure — Judgments and orders — Consent order — Setting aside — Whether there were vitiating factors — Whether consent order entered should be set aside — Whether consent order gave rise to undue preference — Whether terms of consent order uncertain — Whether consent order granted by competent court — Companies Act 2016 ss 409 & 426

The plaintiff, Capital City Property Sdn Bhd ('Capital City') filed the present originating summons vide encl 1 ('OS') seeking to set aside a consent order recorded in an application filed by the plaintiff for a judicial management order pursuant to s 409 of the Companies Act 2016 ('the JM OS') on the grounds, inter alia, that: (a) the consent order was entered into in contravention of s 409 of the Companies Act 2016 ('the CA 2016') as the second to the 141st defendants, not being secured creditors had no locus standi to oppose the JMO; (b) the consent order entered gave rise to undue preference to the second to 141st defendant in contravention of s 426 of the CA 2016; (c) the consent order was a nullity as the terms were uncertain and thus unenforceable; and (d) the consent order was delivered by a court not competent to deliver the same and/or was obtained by fraud or collusion.

Held, dismissing the application with costs:

(1) A consent order could be set aside if there were exceptional circumstances such as fraud, mistake, coercion, undue influence or total failure of consideration in the entering of the same. However, in the present case, none of these elements had been suggested by the plaintiff's erstwhile solicitors as well as the current solicitors. The fact that the plaintiff was represented by legal counsel meant that there must be clear evidence of the presence of vitiating factors before the court could entertain the setting aside of a consent order. Further, the plaintiff had not demonstrated that its counsel lacked authority when agreeing to the consent order. Apart from that, there was an inordinate delay on the part of the plaintiff in making the present application. In fact, no explanation had been proffered on the nine months delay at all. The repercussions of the plaintiff's OS and challenge on the consent order would have

prejudicial effect given that the terms of the consent order had been substantially performed by the parties (see paras 19–23).

(2) As regards the plaintiff's claim that the consent order was entered into in contravention of s 409 of the CA 2016, the said section dealt with the opposition at the hearing of the application for a judicial management order. The said section provided that only secured creditors as opposed to ordinary unsecured creditors may oppose the application for a judicial management order. However, in the present case, when the consent order was entered into before the judge in the JM OS, the judicial management order had already been made vide the JMO. The judge was dealing with, inter alia, an application by the second to 141st defendants as the then proposed intervenors to intervene in the JM OS. The judge clearly had the jurisdiction to make such an order and all the parties, including the plaintiff and the judicial manager had consented to the intervention (see paras 24–25).

(3) As regards s 426 of the CA 2016 on undue preference, the plaintiff was unable to show any undue preference arising in the present case. Further, there was no evidence that the terms of the consent order were uncertain and that the parties to the consent order were not able to perform their respective obligations as agreed. The plaintiff had also failed demonstrate that the court was not competent to record the consent order, and no suggestion of fraud or collusion was made in the plaintiff's affidavits filed in support of the OS (see paras 26–28).

[Bahasa Malaysia summary

Plaintif, Capital City Property Sdn Bhd ('Capital City') memfailkan saman pemula melalui lamp 1 ('SP') yang memohon untuk mengenepikan perintah persetujuan yang direkodkan di dalam permohonan plaintif bagi mendapatkan perintah pengurusan kehakiman menurut s 409 Akta Syarikat 2016 ('SP JM') atas alasan, antara lain, bahawa: (a) perintah persetujuan itu melanggar s 409 Akta Syarikat 2016 ('AS 2016') sebagai defendan kedua hingga ke-141, yang mana pemiutang tidak mempunyai locus standi untuk menentang JMO; (b) perintah persetujuan yang dimasukkan menimbulkan keutamaan yang tidak wajar ('undue preference') kepada defendan kedua hingga ke-141 yang bercanggah dengan s 426 Akta Syarikat 2016; (c) perintah persetujuan itu adalah batal kerana terma-terma tidak dapat dipastikan dan tidak boleh dikuatkuasakan; dan (d) perintah persetujuan telah disampaikan oleh mahkamah yang tidak kompeten dan/atau diperoleh melalui penipuan atau persepakatan.

Diputuskan, menolak permohonan dengan kos:

(1) Perintah persetujuan boleh diketepikan sekiranya terdapat keadaan luar biasa seperti penipuan, kesilapan, paksaan, pengaruh yang tidak wajar

atau kegagalan pertimbangan sepenuhnya ketika memasuki perintah persetujuan. Bagaimanapun, dalam kes ini, tiada satu pun dari unsur-unsur ini dibangkitkan oleh peguamcara plaintif terdahulu dan juga peguamcara plaintif sekarang. Fakta bahawa plaintif diwakili oleh peguamcara bermaksud perlu ada bukti yang jelas mengenai kehadiran faktor-faktor tersebut sebelum mahkamah boleh membenarkan perintah persetujuan tersebut diketepikan. Selanjutnya, plaintif tidak menunjukkan bahawa peguamnya tidak mempunyai kuasa apabila bersetuju dengan perintah persetujuan tersebut. Selain itu, terdapat kelewatan di pihak plaintif di dalam membuat permohonan ini. Malah, tiada penjelasan diberikan mengenai kelewatan selama sembilan bulan itu. SP plaintif dan percubaan untuk mengenepikan perintah persetujuan akan memprejudiskan memandangkan terma-terma perintah persetujuan telah banyak dilaksanakan oleh pihak-pihak (lihat perenggan 19–23).

(2) Mengenai dakwaan plaintif bahawa perintah persetujuan itu dibuat bercanggah dengan s 409 Akta Syarikat 2016, seksyen tersebut dibangkitkan semasa pendengaran permohonan perintah pengurusan kehakiman. Seksyen tersebut memperuntukkan bahawa hanya pemiutang yang dijamin berbanding pemiutang biasa yang tidak dijamin boleh membantah permohonan perintah pengurusan kehakiman. Walau bagaimanapun, dalam kes ini, apabila perintah persetujuan telah dibuat di hadapan hakim di dalam SP JM tersebut, perintah pengurusan kehakiman telah dibuat melalui JMO. Hakim tersebut telah meneliti, antara lain, permohonan oleh defendan kedua hingga ke-141 sebagai pencelah yang dicadangkan ketika itu untuk mencelah di dalam SP JM. Hakim tersebut jelas mempunyai bidang kuasa untuk membuat perintah sedemikian dan semua pihak, termasuk plaintif dan pengurus kehakiman telah bersetuju membenarkan permohonan mencelah (lihat perenggan 24–25).

(3) Mengenai peruntukan s 426 Akta Syarikat 2016 atas keutamaan tidak wajar ('undue preference'), plaintif tidak dapat menunjukkan sebarang keutamaan tidak wajar yang timbul di dalam kes ini. Selanjutnya, tiada bukti bahawa syarat-syarat perintah persetujuan tidak jelas dan pihak-pihak di dalam perintah persetujuan tersebut tidak dapat melaksanakan tanggungjawab masing-masing seperti yang dipersetujui. Plaintif juga gagal menunjukkan bahawa mahkamah tidak kompeten untuk merekodkan perintah persetujuan itu, dan tiada cadangan penipuan atau persepakatan diplidkan di dalam afidavit sokongan plaintif untuk SP tersebut (lihat perenggan 26-28).]

Cases referred to

Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and another appeal [2018] 5 MLJ 125; [2018] 5 CLJ 273, CA (refd)

A *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)
Lee Teng Siong v Lee Geok Thye Holdings Sdn Bhd [2004] 5 MLJ 13, HC (refd)

Legislation referred to

B Companies Act 2016 ss 409, 426

Danny Ng (Danny & Co) for the plaintiff.
Nadiea Afiqah (Zul Rafique & Partners) for the first defendant.
Ranjan Chandran (with N Nandhini Devi) (Hakem Arabi & Assoc) for the second
C *to 141st defendants.*

Ong Chee Kwan J:

SALIENT BACKGROUND FACTS

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[1] The plaintiff, Capital City Property Sdn Bhd ('Capital City') filed the present originating summons under encl 1 ('the OS') seeking to set aside a consent order dated 6 September 2021 recorded before Justice Tuan Nadzarin Wok Nordin in Originating Summons WA-28JM-9–02 of 2022 ('the JM
E OS').

[2] The JM OS was an application filed by the plaintiff for a judicial management order pursuant to s 409 of the Companies Act 2016 ('the CA 2016').

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[3] The plaintiff is the developer of a subject project known under the name and style of 'Capital 21' which consists of a shopping mall service suites and a hotel ('the Capital 21 Project').

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[4] The first defendant, Archwell Property Sdn Bhd ('Archwell Property') is the proprietor of the land where the Capital 21 Project was located.

[5] The second to 141st defendants are purchasers of units parcel in the
H shopping mall service suits of the Capital 21 Project.

[6] The plaintiff had filed the JM OS seeking the appointment of a judicial manager and the Winding Up Court granted a judicial management order ('JMO') on 13 March 2020. The JMO was extended twice, the first extension
I up to 8 September 2021 and the second extension up to 8 January 2022.

[7] Wong Ching Yong, the 142nd defendant in the OS herein was appointed the judicial manager pursuant to the JMO and he performed his duty as an officer accountable to the court from 13 March 2020 up until 8 January 2022.

[8] Subsequent to the JMO, the second to the 141st defendants filed five applications in the JM OS and these applications were duly served on the judicial manager. The two noteworthy applications were:

(a) the application to intervene and set aside the JMO; and

(b) the application to appeal on the rejection of the proof of debts (PODs) by the judicial manager.

[9] All these five applications were served on the plaintiff's erstwhile solicitors, Messrs Ezmeel & Co and affidavits were exchanged in respect of these applications.

[10] All these five applications were called up for hearing on 6 September 2021 and by consent of all parties, the learned judge hearing the JM OS granted the leave to the second to the 141st defendants in the JM OS to intervene in the proceedings, and thereafter the parties recorded a global settlement of their disputes which are encapsulated in the form of a consent order ('the consent order').

[11] By the consent order, paras 1 and 2 of the same state that the second to the 141st defendants are given leave to intervene in the JM OS and that the second to the 141st defendant are, subject to certain conditions, to receive 18 contra commercial units in Capital 21 in full and final settlement of their claims respectively.

[12] The plaintiff is now challenging the said paras 1 and 2 of the consent order on the following grounds:

(a) the consent order was entered into in contravention of s 409 of the CA 2016 as the second to the 141st defendants, not being secured creditors had no locus standi to oppose the JMO;

(b) the consent order entered gives rise to undue preference to the second to 141st defendant in contravention of s 426 of the CA 2016;

(c) the consent order is a nullity as the terms are uncertain and thus unenforceable; and

(d) the consent order was delivered by a court not competent to deliver the same and or was obtained by fraud or collusion.

[13] After hearing oral submissions from counsel and perusing the written submissions filed, I dismissed the plaintiff's OS with costs. I set out my grounds below.

A THE COURT'S DELIBERATION

[14] As a start, it must immediately be noted that it is an indisputable fact that the plaintiff was represented by its erstwhile solicitors, Messrs Ezmeel and Co when the consent order was recorded. Messrs Exmeel & Co had agreed to the terms of the consent order.

[15] Also present during the recording of the consent order were the solicitors representing the judicial manager, Messrs Dennis Nik & Wong and the solicitors for Archwell Property, Messrs Zul Rafique & Partners. None of them objected to the terms of the consent order. This is borne out from the consent order itself.

[16] By the terms of the consent order, the second to the 141st defendants were given leave to intervene and by the settlement of their claims, it must be case that the judicial manager had accepted their position as creditors of the company. The interveners had applied to challenge the judicial manager's rejection of their respective proof of debts.

[17] Significantly, learned counsel for the second to 141st defendants brought to the attention of this Court that the current solicitors for the plaintiff, Messrs Danny & Co took over from Messrs Ezmeel and Co on 15 June 2022. On 17 June 2022 at the hearing of encl 146 which was an application for the discharge of the JMO and the discharge of the judicial manager ('the discharge application') before Justice Nadzarin Wok Nordin in the JM OS, Mr Danny Ng Yeong Chong from Messrs Danny & Co was present. One of the prayers of the discharge application read as follows:

> 5. That notwithstanding the prayers above, the consent order dated 6.9.2021 (annexed hereto as Annexure B') remains in effect. (Reference is made to the Draft Order dated 17th June 2022).

[18] Thus, even at this hearing of the discharge application, there was no objections raised by the new solicitors Messrs Danny & Co on prayer 5 of the discharge application which expressly provides that the consent order shall notwithstanding the discharge of the JMO, remains in effect. This was almost 9 months after the consent order had been recorded.

[19] A consent order can be set aside if there are exceptional circumstances such as fraud, mistake, coercion, undue influence or total failure of consideration in the entering of the same. The Federal Court decision in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 held thus:

> The grounds referred to for setting aside a consent order of a judgement by consent

> are grounds which basically relate to consensus ad idem or the free consent of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgement by consent is undoubtedly based on an agreement of both parties where consent to the agreement must or should have been free in the first place. If the agreement upon which a consent order or judgement by consent is based, is vitiated by any ground recognized in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration …, then such a perfected consent order or judgement by consent could be set aside in a fresh action filed for the purpose. Grounds which would vitiate such free consent should also include misrepresentation, coercion, and undue influence and other grounds in equity.

[20] However, in the present case, none of these elements has been suggested by the plaintiff's erstwhile solicitors as well as the current solicitors. The fact that the plaintiff was represented by legal counsel means that there must be clear evidence of the presence of vitiating factors before the court will entertain the setting aside of a consent order (see: *Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and another appeal* [2018] 5 MLJ 125; [2018] 5 CLJ 273).

[21] The plaintiff has also not demonstrated that its counsel lacked authority when agreeing to the consent order. In *Lee Teng Siong v Lee Geok Thye Holdings Sdn Bhd* [2004] 5 MLJ 13 Vincent Ng J had this to say:

> [10] The *applicants' complaint of alleged lack of authority of their counsel and solicitor is without substance, as there is no affidavit from their counsel, solicitor, respondent or other contributories as to the lack of or for misapprehension of his authority* (see *Lewis v Lewis* (890) 45 Ch D 281) … Counsel and solicitor in the ordinary course of their retainer have the power to enter into compromise or settle disputes …
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> …*The law has become well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matters 'collateral to the action'; and ostensible authority, as between himself and the opposing litigant to compromise the suit without actual proof of authority,* subject to the same limitation …
>
> [11] *Thus, counsel's alleged lack of authority is invariably never a ground to set aside a consent order or a contract. Any injustice suffered by the client could be resolved in the context of a claim against his counsel …*

[22] Quite apart from the aforesaid, it is also my judgment that there is an inordinate delay on the part of the plaintiff in making the present application. In fact, no explanation has been proffered on the nine months delay at all.

[23] The repercussions of the plaintiff's OS and challenge on the consent order will have prejudicial effect given that the terms of the consent order have

A been substantially performed by the parties.

[24] As regards the plaintiff's claim that the consent order was entered into in contravention of s 409 of the CA 2016, a closer study of the said section will disclose that the said section deals with the opposition at the hearing of the
B application for a judicial management order. The said section provides that only secured creditors as opposed to ordinary unsecured creditors may oppose the application for a judicial management order.

[25] However, in the present case, when the consent order was entered into
C before the learned judge in the JM OS, the judicial management order had already been made *vide* the JMO. The learned judge was dealing with, inter alia, an application by the second to 141st defendants as the then proposed intervenors to intervene in the JM OS. The learned judge clearly had the jurisdiction to make such an order. In fact, all the parties, including the
D plaintiff and the judicial manager had consented to the intervention.

[26] As regards s 426 of the CA 2016 on undue preference, learned counsel for the plaintiff was unable to show this court any undue preference arising in
E the present case when asked to do so.

[27] There is also no evidence that the terms of the consent order were uncertain as contended by the plaintiff. There is nothing before this court to suggest that the parties to the consent order were not able to perform their
F respective obligations as agreed.

[28] Counsel for the plaintiff has also failed to demonstrate that the court was not competent to record the consent order and I have also alluded to the fact that no suggestion of fraud or collusion was made in the plaintiff's
G affidavits filed in support of the OS.

CONCLUSION

[29] Thus, for the reasons above, the OS is dismissed with costs.

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Originating summons dismissed with costs.

Reported by K Selvaraju

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